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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

HARPAUL SINGH RANA, Plaintiff and Appellant, v. MANINDER KAUR SINGH, Defendant and Respondent.	H026538 (Santa Clara County Super. Ct. No. CV801867)

The trial court ordered defense summary judgment in this malicious prosecution action. On appeal, the plaintiff argues that disputed material facts require trial. We find no evidence to support plaintiff's argument. We therefore affirm.

BACKGROUND

The parties to this action are plaintiff Harpaul S. Rana (Rana) and his former daughter-in-law, defendant Maninder Kaur Singh (Kaur).[1] Rana brought this malicious prosecution action against Kaur following dismissal of a prior proceeding in which she obtained restraining orders against him.

[1] In referring to the parties by their last names alone, we intend no disrespect. As for calling defendant "Kaur" in this opinion, we do so in order to distinguish her from her ex-husband. We observe that she referred to herself by that name in her summary judgment motion below.

Factual Background

As the result of an arranged marriage, Kaur was married to plaintiff's son, Preet Paul Singh (Singh).

In June 2000, Singh was arrested by the Sunnyvale Public Safety Department for spousal abuse against defendant. (Pen. Code, § 273.5.) Singh was later found factually innocent of the criminal charges.

In connection with his son's arrest, Rana went to the Sunnyvale Public Safety Department headquarters. As described by the reporting law enforcement officer, Rana was "in a rage. He was uncontrollable and indicated he would attack police to be with" his son. The officer also noted Kaur's reports that Rana had slapped her and that he had threatened to "have her deported" and to "destroy her life."

The Prior Proceeding

Based on the foregoing facts, Kaur was granted an emergency protective order, which restrained Rana from contact with her and which included a stay-away order. The emergency order was set to expire five days later.

Just before the emergency order expired, Kaur sought and obtained a temporary restraining order against Rana for domestic violence prevention. In her application for that order, Kaur stated that Rana had slapped her many times, cut her with a knife, and kept her "imprisoned" in his home. Kaur declared her fear of Rana, saying: "He has acted out his anger on me in the past whenever something happens to his son and I fear he will blame me again."

In October 2000, Kaur requested dismissal of her action against Rana. Kaur attributed the dismissal request to her "financial inability to maintain both her dissolution action with her husband and her request for Permanent Restraining Orders against" Rana.

Following Kaur's dismissal of the action, Rana sought attorney fees and sanctions against her. In ruling on the motion, the court stated: "Mr. Rana, all of your allegations don't mean that you're right and she's wrong, and her allegations don't mean she's right

and you're wrong because I have never made a finding, and I won't, because the case has been dismissed. I'm just going to decide whether her actions were such that you should be given some of the attorney's fees back because you had to file papers to oppose it." The court then awarded Rana a portion of the attorney fees he sought, based on its determination that he was the prevailing party under Family Code section 6334. The court refused to award sanctions.

The Current Action

Thereafter, acting in propia persona, Rana instituted this action for malicious prosecution against Kaur. Kaur successfully demurred to Rana's initial complaint. In June 2002, Rana filed an amended, verified complaint. In that pleading, Rana alleged that Kaur brought the prior proceeding maliciously and without probable cause. He further alleged termination of the prior action in his favor.

In her answer, Kaur denied all of the charging allegations of the verified complaint, with the exception of paragraphs I and II. Paragraph I of the complaint alleges her residence in Santa Clara County. Paragraph II alleges her institution of the prior proceeding against Rana and describes various aspects of that proceeding. Among the facts in Paragraph II that Kaur admitted were these: that she did not appear at a scheduled deposition and that she dismissed because "she has no money to spend in this action."

At a case management conference, the parties agreed to non-binding judicial arbitration. The arbitration never commenced, however, because Kaur first sought and obtained summary judgment.

In March 2003, Kaur moved for summary judgment or in the alternative for summary adjudication. (Code Civ. Proc., § 437c.) As required, she filed a separate statement of undisputed facts. (*Id.*, subd. (b)(1).) In support of her motion, Kaur requested the court to take judicial notice of evidence from the prior proceedings, specifically: (1) the emergency protective order issued June 18, 2000, and her

application for it; (2) the temporary restraining order issued June 22, 2000, and her application for it; and (3) the reporter's transcript of the hearing on Rana's motion for sanctions and fees, held November 14, 2000. Kaur also submitted her own declaration in support of the motion.

In opposition to the motion, Rana submitted his own statement of undisputed facts, which neither responded to Kaur's statement nor cited to any evidence in the record.

In July 2004, the court conducted a hearing on the motion. After oral argument by both parties, the court granted Kaur's motion for summary judgment. The court entered a formal order granting defense summary judgment, but no judgment appears in the record.

This appeal by Rana ensued.

CONTENTIONS

Rana asserts that there are many disputed issues of material fact, which make summary judgment inappropriate in this case. Among them, he contends, are Kaur's lack of credibility and her malicious intent.

Kaur disagrees. She argues that the trial court correctly granted her summary judgment motion, given her evidence that the prior proceeding did not terminate in Rana's favor and that she had probable cause to bring it in the first instance, and given Rana's failure to counter that evidence. As a separate ground for affirmance, Kaur makes an argument here that she did not offer below – that summary judgment is proper in this case, because the prior proceedings arose under family law, where malicious prosecution actions are particularly disfavored if not entirely barred.

DISCUSSION

Before reaching the parties' contentions, we first address two threshold issues relating to our review. We then discuss the general legal principles that govern our analysis. Finally, we apply those principles to the case at hand.

I. Threshold Questions

A. Appealability

At the outset, we consider whether Rana's appeal is cognizable. As Kaur observes, Rana's appeal is from the order granting summary judgment. Generally speaking, such an order is not appealable. (*Sullivan v. Delta Air Lines, Inc.* (1997) 15 Cal.4th 288, 307, fn. 10; *LaPlante v. Wellcraft Marine Corp.* (2001) 94 Cal.App.4th 282, 287.) Nevertheless, we have discretion to treat such an appeal as having been taken from a subsequently entered judgment. (*LaPlante v. Wellcraft Marine Corp., supra,* 94 Cal.App.4th at p. 287.) Furthermore, under some circumstances, we may entertain an appeal even where no judgment was ever entered, as is the case here. As long as it is clear that the trial court intended to "finally dispose" of the plaintiff's entire complaint in granting defense summary judgment, "we can amend the order to make it an effective judgment." (*Swain v. California Casualty Ins. Co.* (2002) 99 Cal.App.4th 1, 6.)

In this case, we exercise our discretion to resolve the appeal on its merits, by treating the order as a judgment.

B. The Appellate Record

Rana has made two separate requests of this court to take judicial notice of various documents. We previously granted Rana's first request. However, after more thoroughly reviewing the record that was before the trial court and analyzing the issues that have been presented in this court, we have concluded that we should not consider any of the documents in either of Rana's two requests. We advised the parties of that determination prior to oral argument in this matter.

"Reviewing courts generally do not take judicial notice of evidence not presented to the trial court." (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444, fn. 3. See also, e.g., *Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 184, fn. 1.) By statute and court rule, however, appellate courts have discretion to consider evidence that was not before the trial court. (Code Civ. Proc., § 909; Cal. Rules

of Court, rule 22.) But only "exceptional circumstances" justify review of matters outside the trial court record. (*Vons Companies, Inc. v. Seabest Foods, Inc., supra,* 14 Cal.4th at p. 444, fn. 3.) We find no such exceptional circumstances here. Furthermore, the statute and rule "do not warrant an appellate court's general reversal of a judgment" – such as Rana seeks here – on the basis of evidence presented for the first time on appeal. (*People v. Pena* (1972) 25 Cal.App.3d 414, 422 disapproved on another point in *People v. Duran* (1976) 16 Cal.3d 282, 292. See also, e.g., *In re Zeth S.* (2003) 31 Cal.4th 396, 413-414.)

Even where judicial notice has already been taken, as in this case, "the reviewing court need not give effect to such evidence." (*Doers v. Golden Gate Bridge etc. Dist., supra,* 23 Cal.3d at p. 184, fn. 1; see also, *Windham at Carmel Mountain Ranch Assn. v. Superior Court* (2003) 109 Cal.App.4th 1162, 1173, fn. 11.) As we explained in our correspondence to the parties, giving effect to the noticed documents would improperly expand the narrow scope of appellate review in this case.

When an appellate court reviews a summary judgment, as we are called upon to do here, the only relevant evidence is that reflected in the parties' statements of undisputed facts, submitted as part of the motion in the trial court. (See, e.g., *Lewis v. County of Sacramento* (2001) 93 Cal.App.4th 107, 112; accord, *California School of Culinary Arts v. Lujan* (2003) 112 Cal.App.4th 16, 22.) Because the judicially noticed documents are not incorporated in the fact statements submitted by the parties to the trial court, they are not relevant to the issues on appeal.

Having determined the fact and scope of our review, we now turn to a discussion of the general legal principles that guide our analysis. We first summarize the substantive tort law applicable to malicious prosecution actions.

II. Malicious Prosecution

A. General Principles

"The malicious commencement of a civil proceeding is actionable because it harms the individual against whom the claim is made, and also because it threatens the efficient administration of justice." (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 50.) Nevertheless, as our state's high court has observed, "the elements of the tort have historically been carefully circumscribed so that litigants with potentially valid claims will not be deterred from bringing their claims to court by the prospect of a subsequent malicious prosecution claim." (*Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 872 (*Sheldon Appel*).) Given that policy, the court stated, "we do not believe it advisable to abandon or relax the traditional limitations on malicious prosecution recovery." (*Id*. at p. 874.) One such limitation has been recognized in family law actions. (See *Bidna v. Rosen* (1993) 19 Cal.App.4th 27, 37-38.) More recently, our high court commented favorably on the trend against expanding derivative torts such as malicious prosecution. (*Brennan v. Tremco Inc.* (2001) 25 Cal.4th 310, 314.) "Seeking to avoid 'an unending roundelay of litigation' [citation]," the court "cautioned against creating or expanding derivative tort remedies, at least when the underlying litigation provided adequate remedies. 'In the past, we have favored remedying litigation-related misconduct by sanctions imposed within the underlying lawsuit rather than by creating new derivative torts.' [Citations.]" (*Ibid*. Accord, *Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 816-817.) On the other hand, our court recently observed: "Although malicious prosecution suits are disfavored, we will not bar such suits for that reason alone." (*Casa Herrera, Inc. v. Beydoun* (2004) 32 Cal.4th 336, 349.) Although the underlying public policy " 'has properly served, over many years, to crystallize the limitations on the tort, . . . it should not be pressed further to the extreme of practical nullification . . . .' [Citation.]" (*Ibid.,* quoting *Jaffe v. Stone* (1941) 18 Cal.2d 146, 159-160.)

B. Elements of the Cause of Action

To prevail in an action for malicious prosecution, the plaintiff must show (1) that the defendant caused the initiation of an earlier action, which terminated in favor of the plaintiff; (2) that the defendant had no probable cause for bringing the prior action; and (3) that the defendant acted with malice. (*Casa Herrera, Inc. v. Beydoun, supra,* 32 Cal.4th at p. 341; *Brennan v. Tremco Inc., supra,* 25 Cal.4th at p. 313; *Sheldon Appel, supra,* 47 Cal.3d at p. 872.)

1. Favorable Termination

The element of favorable termination is required in order to demonstrate the plaintiff's innocence of the allegations in the prior proceedings. (*Lackner v. LaCroix* (1979) 25 Cal.3d 747, 750; *Robbins v. Blecher* (1997) 52 Cal.App.4th 886, 893.) To be favorable, the "termination must *reflect* on the merits of the underlying action. [Citation.]" (*Lackner v. LaCroix, supra,* 25 Cal.3d at p. 750. See also *Casa Herrera, Inc. v. Beydoun, supra,* 32 Cal.4th at pp. 341-342.) "It is apparent 'favorable' termination does not occur merely because a party complained against has prevailed in an underlying action. While the fact he has prevailed is an ingredient of a favorable termination, such termination must further reflect on his innocence of the alleged wrongful conduct." (*Lackner v. LaCroix, supra,* 25 Cal.3d at p. 751.) "If the termination does not relate to the merits—reflecting on neither innocence of nor responsibility for the alleged misconduct—the termination is not favorable in the sense it would support a subsequent action for malicious prosecution." (*Ibid.*, fn. omitted.)

" 'A voluntary dismissal may be an implicit concession that the dismissing party cannot maintain the action and may constitute a decision on the merits. [Citation.] "It is not enough, however, merely to show that the proceeding was dismissed." [Citation.] The reasons for the dismissal of the action must be examined to determine whether the termination reflected on the merits.' [Citations.]" (*Robbins v. Blecher, supra,* 52 Cal.App.4th at pp. 893-894.) Thus, for example, voluntary dismissal for mootness does

not constitute a favorable termination. (*Id.* at pp. 894, 895.) Likewise, voluntary "dismissal resulting from a *settlement* generally does not constitute a favorable termination. [Citation.]" (*Fuentes v. Berry* (1995) 38 Cal.App.4th 1800, 1808.) Such a dismissal "reflects ambiguously on the merits of the action" since it leaves open the question of the plaintiff's innocence of the prior allegations. (*Ibid.,* internal quotation marks and citation omitted. See also, e.g., *Pattiz v. Minye* (1998) 61 Cal.App.4th 822, 824 [involuntary dismissal for failure to comply with discovery orders does not reflect on the merits].)

As relevant here, a voluntary dismissal is "not on the merits" where it "resulted from a practical decision that further litigation was too expensive to pursue." (*Oprian v. Goldrich, Kest & Associates* (1990) 220 Cal.App.3d 337, 345.) "It would be a sad day indeed if a litigant and his or her attorney could not dismiss an action to avoid further fees and costs, simply because they were fearful such a dismissal would result in a malicious prosecution action." (*Id.* at p. 344.)

2. Probable Cause

In the malicious prosecution context, probable cause "has classically been defined as 'a suspicion founded upon circumstances sufficiently strong to warrant a reasonable person in the belief that the charge is true.' [Citations.]" (*Nicholson v. Lucas* (1994) 21 Cal.App.4th 1657, 1665.) As the California Supreme Court explained in *Sheldon Appel*, "the probable cause element calls on the trial court to make an objective determination of the 'reasonableness' of the defendant's conduct, i.e., to determine whether, on the basis of the facts known to the defendant, the institution of the prior action was legally tenable. The resolution of that question of law calls for the application of an *objective* standard to the facts on which the defendant acted. [Citation.]" (*Sheldon Appel, supra,* 47 Cal.3d at p. 878.)

"An important policy consideration underlies the common law rule allocating to the court the task of determining whether the prior action was brought with probable

cause." (*Sheldon Appel, supra,* 47 Cal.3d at p. 875.) The law entrusts the court with deciding probable cause as a question of law out of concern "that jurors may not sufficiently appreciate the distinction between a merely unsuccessful and a legally untenable claim." (*Ibid.*) "To avoid improperly deterring individuals from resorting to the courts for the resolution of disputes, the common law affords litigants the assurance that tort liability will not be imposed for filing a lawsuit unless *a court* subsequently determines that the institution of the action was without probable cause. [Citations.]" (*Ibid*. See also *Wilson v. Parker, Covert & Chidester, supra,* 28 Cal.4th at p. 817, fn. omitted [denial of a special motion to strike conclusively establishes probable cause].)

In *Sheldon Appel*, the court also clarified "by how stringent a standard probable cause should be tested." (*Sheldon Appel, supra,* 47 Cal.3d at p. 885.) As the court observed, "it has long been recognized that it is not 'true charges' but rather legally tenable claims for relief that the law seeks to protect. [Citations.]" (*Ibid*.) Given that recognition, the court in *Sheldon Appel* rejected an argument for a strict probable cause test. Instead, the court adopted the standard that it had previously established for testing frivolous appeals, set forth in the case of *In re Marriage of Flaherty* (1982) 31 Cal.3d 637. As the court put it, "we believe that the less stringent *Flaherty* standard more appropriately reflects the important public policy of avoiding the chilling of novel or debatable legal claims. That policy is no less applicable to the institution of actions at the trial stage than to the pursuit of appeals, and . . . we do not believe there is any reason to afford litigants and their attorneys less protection from subsequent tort liability than it is to shield them from court-imposed sanctions within the initial action. [Citations.]" (*Ibid*.) "This rather lenient standard for bringing a civil action reflects 'the important public policy of avoiding the chilling of novel or debatable legal claims.' [Citation.]" (*Wilson v. Parker, Covert & Chidester, supra,* 28 Cal.4th at p. 817, quoting *Sheldon Appel, supra,* 47 Cal.3d at p. 885.)

3. Malice

The third element of the tort is malice, which refers to the defendant's actual ill will or improper purpose in instituting the prior litigation. (See, e.g., *Albertson v. Raboff* (1956) 46 Cal.2d 375, 383.) "The 'malice' element of the malicious prosecution tort relates to the subjective intent or purpose with which the defendant acted in initiating the prior action, and past cases establish that the defendant's motivation is a question of fact to be determined by the jury. [Citations.]" (*Sheldon Appel, supra,* 47 Cal.3d at p. 874.)

C. Proof of the Claim

In order to prevail, the plaintiff in a malicious prosecution action must prove all three elements. (*Brennan v. Tremco Inc., supra,* 25 Cal.4th at p. 313; *Sheldon Appel, supra,* 47 Cal.3d at p. 872.) Doing so presents a "difficult burden of proof" for the plaintiff. (*Jaffe v. Stone, supra,* 18 Cal.2d at p. 159.) In order to successfully oppose a summary judgment motion in which the defendant has made an adequate evidentiary showing, the plaintiff must demonstrate the existence of a disputed issue of fact with respect to each challenged element. (*Oprian v. Goldrich, Kest & Associates, supra,* 220 Cal.App.3d at p. 343.)

To provide the proper procedural framework for analyzing the proof question in this case, we next describe the general rules that govern summary judgments, both in the trial courts and on appeal.

III. Summary Judgment

A. General Principles

Any party to an action may move for summary judgment. (Code Civ. Proc., § 437c, subd. (a); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.) "The motion may be made at any time" subject to certain time constraints, which control how early in the litigation it may be brought and how close to trial it may be heard. (Code Civ. Proc., § 437c, subd. (a).) Provided the summary judgment motion is timely, the right to make and pursue it generally is not curtailed by the pendency of other

proceedings in the litigation, such as a referral for judicial arbitration. (Cf., *First State Ins. Co. v. Superior Court* (2000) 79 Cal.App.4th 324, 333, 336 [in a complex litigation matter, the trial court was required to permit the *filing* of a timely summary motion, but it could postpone *hearing* the motion until after it resolved preliminary choice of law issues].)

The motion "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c). See *Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at p. 843.) The object of the summary judgment procedure is "to cut through the parties' pleadings" to determine whether trial is necessary to resolve their dispute. (*Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at p. 843.)

Ultimately, the party seeking summary judgment "bears the burden of persuasion that there is no triable issue of material fact and that [she] is entitled to judgment as a matter of law." (*Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at p. 850. See Evid. Code, § 115.) Initially, however, the moving party carries the lighter burden of production, which requires only "a prima facie showing of the nonexistence of any triable issue of material fact . . . ." (*Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at p. 850. See Evid. Code, § 110.) "The words 'prima facie' mean literally, 'at first view,' and a prima facie case is one which is received or continues until the contrary is shown and can be overthrown only by rebutting evidence adduced on the other side. [Citation.]" (*Maganini v. Quinn* (1950) 99 Cal.App.2d 1, 8.)

Defendants moving for summary judgment may satisfy their initial burden by producing evidence of a complete defense or of the plaintiff's inability to establish a required element of the case. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at p. 853; *Pattiz v. Minye, supra,* 61 Cal.App.4th at pp. 826-827.)

If a moving defendant makes the necessary initial showing, the burden of production shifts to the plaintiff to make a prima facie showing of the existence of a triable issue of material fact. (Code Civ. Proc., § 437c, subd. (p)(2). See, *Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at p. 850.) "A prima facie showing is one that is sufficient to support the position of the party in question. [Citation.]" (*Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at p. 851.) In making the required prima facie showing, the plaintiff may not rely on the pleadings, except to the extent they are undisputed. (*O'Byrne v. Santa Monica-UCLA Medical Center* (2001) 94 Cal.App.4th 797, 804.) If the plaintiff opposing summary judgment presents evidence demonstrating the existence of a disputed material fact, the motion must be denied. (*Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at p. 856.)

Throughout the process, the trial court "must consider all of the evidence and all of the inferences drawn therefrom." (*Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at p. 856.) The moving party's evidence is strictly construed, while that of the opponent is liberally construed. (*Id*. at p. 843.) The evidence must be "set forth in the parties' statements of undisputed facts, supported by affidavits and declarations, filed in support of and opposition to the motion" for summary judgment. (*Lewis v. County of Sacramento, supra,* 93 Cal.App.4th at p. 112.) "Facts not contained in the separate statements do not exist. [Citation.]" (*Ibid.*) "When a fact upon which [a party] relies is not mentioned in the separate statement, it is irrelevant that such fact might be buried in the mound of paperwork filed with the trial court; the court does not have the burden to conduct a search for facts that [the party] failed to bring out." (*Id.* at p. 116.)

The parties to a summary judgment motion have the right to a hearing to present oral arguments. (*Brannon v. Superior Court* (2004) 114 Cal.App.4th 1203, 1211.) But the court hearing the motion retains substantial discretion to impose reasonable limitations. (*Ibid.*) In contrast to the parties' *arguments*, which may be presented orally, the parties' *evidence* must be in papers submitted in advance of the hearing and

referenced in their separate statements of undisputed facts. (*Lewis v. County of Sacramento, supra,* 93 Cal.App.4th at p. 112.)

B. Appellate Review

"In reviewing an order granting summary judgment, the appellate court examines the facts presented to the trial court and independently determines their effect. [Citation.]" (*Pattiz v. Minye, supra,* 61 Cal.App.4th at p. 826.) The grant of summary judgment is subject to de novo review on appeal because it presents questions of law. (*Buss v. Superior Court* (1997) 16 Cal.4th 35, 60; *Barton v. Elexsys Internat., Inc.* (1998) 62 Cal.App.4th 1182, 1187.) For that reason, we are not bound by the trial court's stated reasons for its grant of summary judgment. (*Rubenstein v. Rubenstein* (2000) 81 Cal.App.4th 1131, 1143.) We review the ruling itself, not the trial court's rationale. (*Ibid*.) But we may not affirm a grant of summary judgment on a ground not relied on by the trial court, unless we first afford the parties an opportunity to brief the issue. (Code Civ. Proc., § 437c, subd. (m)(2).)

In undertaking our independent review of the evidence submitted, we apply the same three-step analysis as the trial court. (*Varni Bros. Corp. v. Wine World, Inc.* (1995) 35 Cal.App.4th 880, 886-887.) First, we identify the issues. Next, we determine whether the moving party has established facts justifying judgment in its favor. Finally, if the moving party has carried its initial burden, we decide whether the opposing party has demonstrated the existence of a triable, material fact issue. (*Ibid*.)

In "reviewing a motion for summary judgment, the relevant facts are limited to those set forth in the parties' statements of undisputed facts, supported by affidavits and declarations, filed in support of and opposition to the motion in the present case, to the extent those facts have evidentiary support. [Citations.]" (*Lewis v. County of Sacramento, supra,* 93 Cal.App.4th at p. 112. Accord, *California School of Culinary Arts v. Lujan, supra,* 112 Cal.App.4th at p. 22.)

IV. Analysis

Governed by the foregoing principles, we turn to the case at hand.

In view of the fact that Rana is acting in propia persona, we first clarify the ground rules that apply to that status. As our high court has made clear, "mere self-representation is not a ground for exceptionally lenient treatment." (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 984.) "A doctrine generally requiring or permitting exceptional treatment of parties who represent themselves would lead to a quagmire in the trial courts, and would be unfair to the other parties to litigation." (*Id.* at p. 985.) Parties who represent themselves therefore must adhere to the same restrictive rules of procedure as attorneys. (*Id.* at pp. 984-985; *Nelson v. Gaunt* (1981) 125 Cal.App.3d 623, 638-639.) The same principle applies on appeal. (See *Muller v. Muller* (1956) 141 Cal.App.2d 722, 732.)

A. The Issues

As the first step in analyzing whether the trial court acted properly in granting defense summary judgment, we identify the relevant issues. Kaur's motion raised two issues: (1) Did the prior action terminate in Rana's favor? (2) Did Kaur have probable cause to initiate the prior action?

B. Defendant Kaur's Initial Showing

The second step in the analysis requires us to evaluate the evidentiary showing that Kaur made in support of her summary judgment motion. In this part of the analysis, we assess whether Kaur carried her initial burden of presenting evidence to the trial court that demonstrates "the nonexistence of any triable issue of material fact" concerning the two challenged elements of the tort. (*Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at p. 850.) " 'Burden of producing evidence' means the obligation of a party to introduce evidence sufficient to avoid a ruling against him on the issue." (Evid. Code, § 110.)

1. Evidence of Favorable Termination

In her separate statement of undisputed facts, Kaur referred to evidence showing that the prior action was not terminated on the merits. That evidence includes the reporter's transcript from the hearing in November 2000 on Rana's request for fees and sanctions, which Kaur requested the trial court to judicially notice. As that transcript reflects, the trial judge in the former action found Rana to be the prevailing party, but he explicitly refused to rule on the merits of the dismissed proceeding. (See *Lackner v. LaCroix, supra,* 25 Cal.3d at p. 751 [status as prevailing party does not equate with favorable termination].) A reasonable inference from that evidence is that Rana cannot establish that the prior action terminated in his favor.

Kaur's evidence on this point also includes her own declaration, in which she states under penalty of perjury that she requested dismissal based on her "financial inability to maintain both her dissolution action" and the proceeding against Rana. With this evidence, Kaur made an adequate prima facie showing that Rana cannot prevail on the issue of favorable termination. (See *Oprian v. Goldrich, Kest & Associates, supra,* 220 Cal.App.3d at p. 345 [no favorable termination where dismissal is based on financial decision not to pursue the action]; cf., *Weaver v. Superior Court* (1979) 95 Cal.App.3d 166, 185-186 [no summary judgment where facts supporting claim of financial inability to pursue the litigation were ambiguous].)

2. Evidence of Lack of Probable Cause

The issue of probable cause was also addressed in Kaur's separate statement of undisputed facts, as supported by her proffered evidence. In her declaration, Kaur states that she applied for and obtained restraining orders against Rana. Kaur's request for judicial notice includes her application for those orders. Her application, in turn, incorporates statements made under oath that describe her fear of Rana and the basis for that fear.

Under the lenient standard that governs probable cause determinations, the foregoing evidence constitutes a prima facie showing that Kaur had probable cause to seek restraining orders against Rana. (Cf. *Fleishman v. Superior Court* (2002) 102 Cal.App.4th 350, 355 [the issuance of a preliminary injunction conclusively establishes probable cause].)

In sum, Kaur's evidence satisfies the requirement of a prima facie showing of Rana's inability to establish two of the three elements that are needed to support his cause of action for malicious prosecution.

C. Plaintiff Rana's Showing

That brings us to the third step in the analysis. Because Kaur carried her initial burden as moving party, the burden of production shifted to Rana. (Code Civ. Proc., § 437c, subd. (p)(2). See, *Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at p. 850.) We must now decide whether Rana carried that burden. The question is whether he produced evidence in the trial court demonstrating the existence of a disputed material fact issue.

"An issue of fact is not created by speculation, conjecture, imagination, or guesswork; it can be created only by a conflict in *the evidence* submitted to the trial court in support of and in opposition to the motion. [Citation.]" (*Lewis v. County of Sacramento, supra,* 93 Cal.App.4th at p. 116, italics added.) In this context, evidence includes such items as sworn declarations and documents for which a proper foundation has been laid. "A motion for summary judgment must be decided on admissible evidence in the form of affidavits, declarations, admissions, answers to interrogatories, depositions and matters of which judicial notice may be taken. [Citation.]" (*Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1119-1120.)

1. Rana Failed To Carry His Burden

Here, Rana submitted no evidence whatsoever in his opposition papers. Nor did he request the trial court to judicially notice any documents. Rana's separate fact

statement makes no reference to any evidence, except an attached exhibit for which no foundation is provided.

To the extent that the pleadings are uncontested, of course, Rana was entitled to rely on them. (*O'Byrne v. Santa Monica-UCLA Medical Center, supra,* 94 Cal.App.4th at p. 804.) In this case, however, the relevant admissions in Kaur's answer to the verified complaint establish only that she instituted the prior action and that she dismissed it because she could not afford to proceed. As to the evidence of his son's factual innocence, that does not create a triable issue, because it does not tend to prove that Kaur lacked probable cause to fear *Rana*. In short, the pleadings do not assist Rana.

Having presented no evidence whatsoever to counter Kaur's showing, Rana has completely failed to demonstrate the existence of a factual dispute requiring trial. For that reason, defense summary judgment was properly granted here.

2. There Is No Basis For Reversing The Order

We also must reject Rana's other challenges to the order.

In one challenge, Rana asserts that the trial court erred in holding the arbitration proceedings in abeyance. But as we have explained, the pendency of other proceedings in the litigation is generally no impediment to the determination of a summary judgment motion. (Cf. *First State Ins. Co. v. Superior Court, supra,* 79 Cal.App.4th at p. 336.)

In a related charge, Rana complains that he was denied an opportunity for discovery in the case. There is a statutory provision for continuing the hearing on a summary judgment motion to permit discovery. (Code Civ. Proc., § 437c, subd. (h).) "The decision whether to grant a continuance is within the discretion of the trial court." (*Desaigoudar v. Meyercord* (2003) 108 Cal.App.4th 173, 190.) Here, however, Rana did not request a continuance. Nor does he show or even suggest an abuse of the trial court's discretion in not continuing the hearing on its own motion. (*Id.* at pp. 190-191.)

Rana also takes issue with the manner in which the trial court treated him at the hearing. He contends that he was not given the "opportunity to express himself" and that

the court continually interrupted him, saying that it had already decided the matter. Having read the complete transcript of the hearing, we must disagree. It appears that Rana misunderstood the nature of the oral hearing, which merely affords the parties "an opportunity to address perceived legal and factual misconceptions in the court's tentative rulings . . . ." (*Brannon v. Superior Court, supra,* 114 Cal.App.4th at pp. 1210-1211.) The hearing is not a forum for presenting evidence or further pleadings. We believe that is what the trial court was trying to convey when it stated: "Whatever someone says in court really has no meaning. It's what's in the papers and what are in the separate statements of fact that guides me – or actually controls my decision in a motion for a summary judgment." Furthermore, we reiterate, the court has substantial discretion in how it conducts the summary judgment motion hearing. (*Id.* at p. 1211.) The hearing was properly conducted in this case.

In a more pervasive complaint, Rana attacks the order based on Kaur's credibility. Again, however, he offered no *evidence* bearing on that point in his papers. In any event, as a general rule, summary judgment "shall not be denied on grounds of credibility . . . ." (*Allen v. McMillion* (1978) 82 Cal.App.3d 211, 215-216.) The statute thus provides: "If a party is otherwise entitled to a summary judgment pursuant to this section, summary judgment may not be denied on grounds of credibility or for want of cross-examination of witnesses furnishing affidavits or declarations in support of the summary judgment," subject to exceptions that do not apply here. (Code Civ. Proc., § 437c, subd. (e).)

In short, we find no basis for reversing the order granting defense summary judgment in this case. Rana offered no evidence in opposition to the motion in the trial court, and he offers no cognizable argument for reversal on appeal. Given that conclusion, we need not and do not address Kaur's contention that the current action is barred because the prior action arose out of a family law dispute.

DISPOSITION

The matter is remanded to the trial court, with directions (1) to amend its order on the motion for summary judgment, entered July 25, 2003, to grant judgment on the complaint in favor of the defendant, Maninder Kaur Singh; and (2) to enter that judgment nunc pro tunc. As amended to constitute a judgment, the order is affirmed. Defendant shall have her costs on appeal.

_____
McAdams, J.

WE CONCUR:

_____
Elia, Acting P.J.

_____
Bamattre-Manoukian, J.